HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF:	A Complaint by William Webb against LHS Holdings Inc. o/a Manigaming Resort, Sandra Carlson and Lennard Carlson, alleging a breach of section 13 of *The Human Rights Code;*
AND IN THE MATTER OF:	*The Human Rights Code*, C.C.S.M. Chapter H175, as amended.

BETWEEN:

WILLIAM WEBB,

Complainant,

- and -

LHS HOLDINGS INC. o/a Manigaming Resort., SANDRA CARLSON and LENNARD CARLSON,

Respondents.

DECISION

HEARING DATES: September 21, 22, 23, 2020

APPEARANCES:
William Webb, in person, Complainant
Devin Johnston, in person, for the Commission
Sandra and Lennard Carlson, in person, for the Respondents

ADJUDICATOR: Karine M. Pelletier

I. INTRODUCTION

1. On or about October 27, 2014, Mr. Webb submitted a complaint of discrimination to the Commission (the "Complaint"). Mr. Webb alleges that the Carlsons discriminated against him in the provision of services on the basis of disability, including reliance on a service animal, contrary to section 13 of The Human Rights Code ("The Code").

2. The hearing proceeded in-person on September 21 and 22, 2020.

3. At the conclusion of the evidentiary phase of the hearing, the Carlsons confirmed that they did not dispute that Mr. Webb suffers from a disability, for which he is reliant on a guide dog. Further, they acknowledged that Mr. Webb had established, on the evidence presented, a *prima facie* case of discrimination under *The Code*. Therefore, the Carlsons' defence to the acknowledged *prima facie* discrimination rests solely upon it proving that their actions and their No Pet Policy (the "Policy") was applied in good faith and was objectively justifiable. The Carlsons further contend that they attempted to accommodate Mr. Webb to the point of undue hardship.

II. BACKGROUND FACTS

4. While some evidence was presented at the hearing, most of the evidence was presented by way of an Agreed Statement of Fact, which provides as follows:

   1. William Webb is an individual who currently resides in the Province of British Columbia.

   2. Kerry Webb and William Webb (collectively, the "Webbs") were married spouses at the time of the events giving rise to the complaint.

   3. Sandra Carlson and Lennard Carlson (collectively, the "Carlsons") are married spouses. The Carlsons were formerly the shareholders and owners of LHS

Holdings Inc. and operated the Manigaming Resort at Clear Lake in the Province of Manitoba.

4. Subsequent to the matters at issue in this adjudication, the Carlsons sold their interest in LHS Holdings Inc. through a share purchase agreement with Greg H. Ryz and Linda P. Ryz made September 24, 2014.

5. William Webb has been diagnosed with post-traumatic stress disorder. He relies on a service animal to help him cope with this condition. At the time of the events giving rise to the complaint, he relied on a service dog named "Spencer".

6. In August 2014, Kerry Webb booked a reservation for herself, William Webb, and their two children then aged 4 years old and 1 year old to stay at the Manigaming Resort from August 29th, 2014 to September 1st, 2014. The reservation was confirmed by the Manigaming Resort.

7. The Webbs, together with their children and Spencer, arrived at the Manigaming Resort on August 29, 2014.

8. Upon arriving at the Manigaming Resort, a number of discussions occurred involving both the Webbs and the Carlsons. The Parties do not agree on the specific details of these conversations.

9. The Webbs ultimately did not stay at the Manigaming Resort.

10. The Webbs' deposit for the reservation was fully refunded. As a result, the Manigaming Resort received no payment for the reservation.

11. On October 29, 2014, William Webb filed a (*sic*) complaint number 14 EN 262 with the Manitoba Human Rights Commission, alleging that LHS Holdings o/a Manigaming Resort contravened sections 13 and 19 of *The Human Rights Code*.

12. On August 6, 2015, Lennard Carlson submitted a written reply to the complaint to the Manitoba Human Rights Commission.

13. Following an investigation of the complaint, the Manitoba Human Rights Commission requested that the Chief Adjudicator designate an adjudicator to adjudicate this complaint, but only as it relates to an alleged contravention of section 13 of *The Human Rights Code*.

14. On October 2, 2019, Adjudicator Karine Pelletier was designated as a Board of Adjudication to hear and decide this complaint.

15. On July 22, 2020, Adjudicator Karine Pelletier issued an Interim Decision amending the complaint to add Sandra Carlson and Lennard Carlson as Respondents.

5. Further evidence was led relating to Mr. Webb's medical condition and his reliance on a service animal to address his medical needs. The Commission called as a witness George Leonard, a master trainer with an organization named MSAR, who provided evidence about Spencer's training and certification.

6. The remaining evidence related to the incident in question, that resulted in the Webbs cancelling their reservation with the Manigaming Resort. The uncontested evidence was that the Webbs, upon arriving at the Manigaming Resort, were initially advised that they would not be permitted to stay at the resort, as they had along with them an animal. Once Spencer was identified as a service animal, further discussions ensued, and the Carlsons offered the opportunity for the Webbs to stay at the resort, provided that they abide by certain terms and conditions, including that the service animal use the rear door to the unit, and not be allowed to use the courtyard of the resort (where the pool and other shared amenities were located). They reasoned that this was a reasonable request, as all guests of the resort were required to use the rear door to

their respective units after 9 p.m. As a result of the adjudicator's question, Lennard Carlson confirmed the statement in his Reply that it was also a condition that the service animal not be left alone in the unit.

7. The Webbs found these conditions to be unacceptable, and insisted that they be permitted to stay at the resort, without conditions. Mr. Webb testified that, while he did not propose any alternative accommodation, he was only requesting access to the unit that they had previously booked, and to be treated no different than any other guest of the resort. In any event, Mr. Webb testified that the tone of the conversation led him to believe that the Carlsons were inflexible in their approach.

8. A significant amount of time at the hearing was spent discussing Mr. Webb's and Mr. Carlson's tone and demeanour. Mr. Leonard advised that, when he was on the phone with Mr. Webb, he heard people yelling in the background. Mr. Webb testified that Mr. Carlson angry, and he was clearly agitated by the exchange. Mr. Carlson testified that Mr. Webb was angry, and that he was yelling. Ms. Webb testified that, while there may have been raised voices, at no time did Mr. Webb yell, as suggested. In fact, she testified that she was proud of the way he had comported himself in this exchange. And Mrs. Carlson testified that Mr. Webb was visibly shaken and angered by the discussion.

9. As the dispute over the proposed accommodation between Mr. Webb and the Carlsons progressed, Mr. Webb acknowledged that he was frustrated. When it became clear that the Carlsons were insistent on what he considered to be unreasonable terms and conditions, Mr. Webb decided to cancel the reservation and determined that it would be unwise to conduct business with the Manigaming. Before doing so, he testified that he offered the opportunity for the Carlsons to consult with someone to discuss what the consequences might be if they refused service to an individual suffering from a disability. In fact, Mr. Webb had George Leonard on the telephone

and offered that the Carlsons speak to him before they denied the Webbs the opportunity to stay at the resort, without imposing what they considered to be unreasonable conditions.

10. The Carlsons testified that, though they recognize that Spencer is a service animal, they reasoned that their Policy was standard practice in the hospitality industry. The Carlsons testified that they considered a number of options in attempting to accommodate Mr. Webb, even though they did not have any advance notice or any type of request for an accommodation, or any indication that the Webbs would be arriving at the resort accompanied by a service animal.

11. The Carlsons recalled that this particular weekend was one of the busiest weekends in the summer, and that the resort was fully occupied. They testified that they were informed of the request for an accommodation at the last hour, once other guests had already occupied all other suites in the resort, leaving a single unit available for the Webbs. If they had moved the Webbs to another, more suitable location, it would have required the Carlsons to evict or displace a guest, which was neither reasonable, nor feasible. However, they remarked that if they had advance notice of the request for accommodation, the Carlsons would have been better equipped to accommodate the Webbs. In the absence of any advance request, the Carlsons testified that they were limited in attempting to locate suitable accommodations for Mr. Webb.

12. The Carlsons considered the possibility of accommodating Mr. Webb by imposing what they considered to be reasonable conditions (that the service animal use the rear door to the unit; not be allowed to use the courtyard of the resort; and not be left unaccompanied). The Carlsons advised that they were attempting to strike the right balance between the rights of the guests of the resort, and the Webbs. The Carlsons testified that they were trying to find a solution that would allow Mr. Webb to use and enjoy the room and the resort's amenities, while also ensuring that other guests could

enjoy their holiday safely and without disruption; to ensure the safety of the animal, who may be distracted by children and other guests; and to minimize costs associated with any clean up required as a result of allowing the animal on the property.

13. While the Carlsons were prepared to absorb all costs required to clean the unit, they were not prepared to absorb additional costs for the clean up of the courtyard. From their perspective, the costs associated with cleaning up of the unit on its own would have consumed much of their profit. To be responsible for the additional costs required to clean the courtyard would have led to a total loss of income for the Carlsons.

14. Further, and in any event, the Carlsons testified that the Webbs did not propose any reasonable or alternative accommodation that would have adequately satisfied them that their concerns relating to the service animal were being addressed.

15. In cross-examination, Mr. Carlson confirmed that he did not have any specific knowledge of any guest who would have had concerns with Spencer, or if there was any specific guest who suffered from allergies. He advised that they neither acquired, nor retained this type of information.

16. It was unclear from the evidence that the Webbs understood from the Carlsons that there was a rear door to the unit. The Webbs testified that the proposed accommodation was unacceptable as it would have deprived them of the full use and enjoyment of the resort, which included a courtyard, a pool, and other shared amenities. Further, they added that the Carlsons had informed them that if Spencer made a noise, they would be asked to leave. The Webbs did not find these terms reasonable or acceptable.

17. In any event, Mr. Webb confirmed that he did not expect to receive alternative accommodation. Mr. Webb only sought the room which he and his family had

previously reserved, with the opportunity to fully utilize the common areas of the resort. He advised that he was not seeking any special treatment, or particular accommodation.

18. The Carlsons testified that, once it became apparent that the Webbs were not prepared to accept the proposed accommodation, Ms. Carlson attempted to contact each of the seventeen resorts in the Clear Lake region to attempt to locate a vacancy for the Webbs. As it was a very busy weekend, Ms. Carlson testified that she was unable to find alternative accommodation for the Webbs.

19. The Webbs testified that they were able to secure substandard accommodation, described by Mr. Webb as a "dump". It had no amenities, only one bed for four people, no heat and a small black and white television.

20. The Webbs testified that they not only lost the opportunity to stay at the Manigaming Resort, but also suffered financial loss as a result. While acknowledging that they were reimbursed by the Carlsons, they were required to find alternative accommodation on a busy long weekend. The cost per night was more than they had anticipated paying at the Manigaming Resort. They testified that, as a result of the additional expense, they were required to cut their vacation short and cancel a fishing boat that they had rented.

21. The Carlsons testified that, while the alternative accommodation secured may not have had the same amenities as the Manigaming, the Webbs were able to find accommodation in the area on a busy long weekend. The Carlsons testified that they witnessed the Webbs around town over the weekend, and they appeared to be enjoying themselves.

22. Mr. Webb countered that the weekend was not enjoyable for his perspective, and the experience left his distressed. He spent most of the weekend in the rented room, and

they cut their trip short as a result of the additional expenses. He explained that this event was devastating to him, and that his mental health regressed significantly following this incident. Ms. Webb confirmed that much of the progress that had been gained as a result of acquiring Spencer was lost following the incident at the Manigaming Resort, and that shortly thereafter, Mr. Webb was hospitalized due to a suicide attempt. As a result of the discriminatory treatment endured that led to a deterioration in his health, Mr. Webb seeks to be compensated.

23. The Carlsons do not deny that Mr. Webb was affected by the incident, but deny that their actions led to the regression described by Mr. Webb. They pointed out that Mr. Webb had a pre-existing condition, with periodic suicidal ideation, including an unsuccessful attempt a few months earlier. The Carlsons argued that any deterioration in his health could not be solely attributed to them or the incident in question.

III. ISSUES

24. As the Carlsons acknowledged that Mr. Webb has established a *prima facie* case of discrimination, the issue is whether the Carlsons can rely on Section 13 of *The Code* to justify the discrimination. In so doing, the onus is on the Carlsons to prove, on a balance of probabilities, that *bona fide* and reasonable cause exist for the discrimination and that they attempted to accommodate Mr. Webb to the point of undue hardship.

25. The Carlsons may satisfy their onus by demonstrating that they offered reasonable accommodation and could not accommodate Mr. Webb further without causing undue hardship.

IV. POSITIONS OF THE PARTIES

26. In light of the Carlsons' acknowledgement that Mr. Webb has established a *prima facie* case of discrimination, I have not reproduced in detail the Commission's and Mr. Webb's respective submissions on the issue of establishing a *prima facie* case of discrimination. Rather, I have summarized their position on the issue outlined above, of whether *bona fide* and reasonable cause exist for the discrimination, and whether the Carlsons attempted to accommodate Mr. Webb to the point of undue hardship.

(a) For the Commission

27. The Commission contends that the Carlsons have failed to provide *bona fide* and reasonable cause for the discrimination against Mr. Webb, and have failed to demonstrate that they attempted to accommodate him to the point of undue hardship

28. The Commission outlines that the Webbs specifically elected to book a room at this particular resort, given the amenities offered. They were familiar with the resort, as they had stayed there a few years earlier. They were looking forward to spending time together, as a family. When they arrived after a long drive, they were met with resistance from the owners, who initially attempted to deny them entry as they were accompanied by what they assumed to be a pet. Once it was explained to the Carlsons that Spencer was a service animal, they nevertheless insisted on their Policy, but were prepared to provide the Webbs the opportunity to stay only if they accepted certain conditions or limitations: the animal could neither be in the courtyard, nor enter the suite through the courtyard; if the animal was disruptive, the Webbs would be asked to leave the hotel; and the animal could not be left unattended.

29. From the Commission's perspective, the Carlsons' proposal would have deprived Mr. Webb the enjoyment of the shared amenities and features of the resort. Rather than reasonably accommodating Mr. Webb and his family in the unit that they had rented,

they were required to find inferior, more expensive accommodation, that did not provide them the same level of amenities or comfort. The experience was extremely distressing to the Webbs, who had to cut their trip short as a result.

30. The Commission submits that, while their Policy was not intended to target a specific group, it had an adverse and differential effect on Mr. Webb as a result of his reliance on a service animal.

31. The Commission relied on the decision in *British Columbia (Superintendent of Motor Vehicle)* v. *British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868. ("Grismer"), which describes the framework for considering whether *bona fide* and reasonable justification exist for the discrimination. In *Grismer*, the Supreme Court of Canada set out that a service provider must demonstrate that a policy is:

    (1) For a purpose or a goal that is rationally connected to the provision of the service;

    (2) Adopted in good faith, in the belief that it is necessary for the fulfillment of a legitimate service-related purpose or goal; and

    (3) Reasonably necessary to accomplish the legitimate service-related purposes.

32. The Commission focussed on the third component of the test: that the Policy was reasonably necessary to accomplish a business-related purpose, in the sense that Mr. Webb could not reasonably be accommodated without the Carlsons incurring undue hardship.

33. The Commission submits that the Policy treats an individual reliant on a service animal more harshly than other guests as a result of their disability, by imposing restrictions that would limit their ability to enjoy the property and its amenities in the same way as other guests. The Commission contends that the Carlsons' suggestion that the Policy is necessary to address guest concerns such as allergens, damage and disturbance,

was not borne out in the evidence. In fact, the Commission argues that the Carlsons did not call any evidence to suggest that it was necessary to impose the Policy in this particular instance, given the expressed concerns of guests, or that the service animal was not housetrained or disruptive. Instead, the evidence demonstrated that the animal was a highly trained animal for specific duties, and that these tasks were related to Mr. Webb's disability.

34. The Commission submits that service providers are under a legal obligation to ensure services are accessible to individuals with protected characteristics under *The Code*. In light of the evidence presented, the Commission contends that the Carlsons have not shown that the discrimination was *bona fide* and reasonable.

35. The Commission also outlines that, as a result of this event, Mr. Webb's health was significantly impacted. While acknowledging that this deterioration cannot be solely attributed to one cause, from the Commission's perspective, it is reasonable to conclude that this incident was a precipitating event that contributed to the Mr. Webb's regression. As a result, the Commission submits that Mr. Webb ought to be entitled to $9,000.00 for injury to dignity, self respect and feelings. In support, the Commission relies on the decision in *C.C.* v. *J.L., supra,* and *Nachuk* v. *City of Brandon*, 2014 CanLII 20644 (MB HRC), which both addressed matters involving the denial of service on the basis of disability, including reliance on a service animal.

36. The Commission also relies on the following authorities in support: *Blencoe* v. *British Columbia Human Rights Commission*, [2000] 2 R.C.S. 307; *C.C.* v. *J.L. o/a [….] Restaurant*, [2014] O.H.R.T.D. No. 1872; *Moore* v. *British Columbia (Education)*, [2012] 3 S.C.R. 360; and *Nova Scotia Construction Safety Association* v. *Nova Scotia (Human Rights Commission)*, [2006] N.S.J. No. 210.

(b) For the Complainant

37. Mr. Webb explains that he suffers from an "invisible disability", where the benefits of having a service animal are not self-evident. This has led to many, including the Carlsons, questioning his need for a service animal. There is still a stigma, he added, in the business community, specifically in light of the influx of "fake" or falsified identification of service animals which are readily available online. While he advises that its not his job to educate individuals how to deal with people with disabilities, it has become his role more often than he would like. In this case, Mr. Webb says that his service animal was clearly identifiable, as he was wearing a vest with markers and identifiers, and he had with him the necessary documentation in his wallet, prepared to provide the necessary proof in support, if required.

38. Mr. Webb's evidence was that he has stayed in dozens of hotels across Canada and the United States with his service animal, and has never before been turned away. While he added that some staff may lack training, the issue is quickly rectified with some education.

39. Mr. Webb submits that the restrictions that the Carlsons sought to impose on him and his service animal would have negatively impacted him and his family. Without being able to take his animal into the courtyard, he would have been unable to access the front door of his unit, and he would have been unable to fully enjoy the amenities of the resort with his wife and children.

40. Mr. Webb alleges that the Carlsons' conduct was such that he felt he had no choice but to walk away, as they were inflexible in their approach. From the Mr. Webb's perspective, "it felt prudent not to conduct any business with the Manigaming resort". The situation exacerbated Mr. Webb's medical condition and created an undue

hardship for him and his family. For this, Mr. Webb contends he should be appropriately compensated.

(c) For the Respondent

41. The Carlsons raised three grounds in support of their position that they attempted to accommodate Mr. Webb to the point of undue hardship. The Carlsons defended their reliance on their Policy, referring to the three-step test set out in *Grismer*, *supra*, in which it is outlined that a respondent must demonstrate that:

> (1) it adopted [the Policy] for a purpose or goal that is rationally connected to the function being performed;
>
> (2) the [Policy] was adopted in good faith, in the belief that it was necessary for the fulfillment of the purpose or goal; and
>
> (3) the [Policy] is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship. (at para. 20)

42. As it relates to the first prong of the test, the Carlsons claim that they adopted the Policy to provide all guests a peaceful and respectful environment. In so doing, they claim that the Policy was adopted for a purpose or goal that is rationally connected to the function being performed. Specifically, the Carlsons argue that they adopted the Policy to serve three main objectives or goals, namely:

   a. to ensure the health and safety of guests of the resort, and specifically those suffering from allergies or other health concerns;

   b. to guarantee the enjoyment of guests, to not be disturbed by unruly or otherwise disruptive pets; and

   c. to protect damage to rooms and to the property by limiting costs associated with pet clean up.

43. Referring to the second stage of the test, the Carlsons contend that they adopted the Policy in the belief that it was necessary for the fulfillment of these purposes and goals.

44. As it relates to the third prong of the test, the Carlsons advise that the Policy was reasonably necessary to fulfill the purpose or goal of the Policy. The Carlsons made reasonable efforts to attempt to accommodate Mr. Webb by:

   a. Considering moving the Webbs to another unit. This would have required evicting or displacing another guest or guests from a more expensive suite to accommodate the Webbs. In the circumstances, this was not a viable possibility.

   b. Accommodating the Webbs, by imposing conditions on its use: that the service animal use the rear door to the unit, and not be allowed to use the courtyard of the resort. The Carlsons advise that this was reasonably necessary to ensure that a balance was struck between the rights of other guests who were attempting to enjoy their holiday safely and without disruption; to ensure the safety of the animal, who may be distracted by children and other guests who may wish to pet the animal; and to minimize the costs associated with the clean up as a result of allowing the animal on the property. While the Carlsons were prepared to pay for the cleaning of the unit, they were not prepared to absorb additional costs for the clean up of the courtyard. This would have engendered a loss of income.

   c. Finally, when the Webbs advised that they were not prepared to accept the conditions imposed by the Carlsons, Mrs. Carlson made significant strides to attempt to find alternative accommodations for the Webbs. As it was a busy long weekend, Mrs. Webb was unable to find suitable accommodation. In the result, the Webbs were able to secure another hotel room. While it may not

have had access to the same amenities offered at the Manigaming resort, the evidence was that they had seen them around town over the weekend, and that appeared to be enjoying themselves. The Webbs were reimbursed all fees payed, and the Carlsons were unable to find a guest to occupy the unit over the course of the weekend. The Carlsons claim that they suffered a loss of revenue as a result.

45. For these reasons, the Carlsons submit that they attempted to accommodate Mr. Webb to the point of undue hardship. Relying on their Policy, the Carlsons submit that there was *bona fide* and reasonable cause for the discrimination. The Carlsons deny any breach of *The Code,* and refute that Mr. Webb should be entitled to any compensation as a result.

46. In the alternative, the Carlsons argue that any remedy ordered should be significantly less than the amount claimed by Mr. Webb. In support, they relied on a number of awards, involving instances where it was found that complainants had been discriminated against on the basis of their disability-related needs, such as is the case here: *Brockmeyer v. Cornerstone Housing Corp (Cornerstone Life Lease),* 2014 CanLII 6561 (MB HRC); *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1, 1999 CanLII 652 (S.C.C.) (hereafter "*Meiorin*"); *T.A.* v *Manitoba* (*Justice*), 2019 MBHR 12; *Gauthier* v. *Yonge Palace Guest House North York Centre*, 2019 HRTO 840; *Schussler* v. *1709043 Ontario*, 2009 HRTO 2194; *Robdrup* v. *J. Werner Property Management,* 2009 HRTO 1372; *Sprague v. RioCan Empress Walk Inc.*, 2015 HRTO 942; *Smolak* v. *1636764 Ontario*, 2009 HRTO 1032; *P.G.* v. *Groupe Restaurant Imvescor Restaurant Group Inc. o/a Baton Rouge Restauran*t, 2016 HRTO 500; and *Athey* v. *Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458.

V. LAW

47. *The Code* prohibits discrimination and harassment on the basis of a person's actual or perceived disability. Mr. Webb alleges he was discriminated against in respect of services, accommodation, etc. on the basis of a disability contrary to section 13 of *The Code*, and his reliance on a service animal. This is prohibited by section 13 of *The Code,* which states:

> Discrimination in service, accommodation, etc.
> 13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

48. Pursuant to Section 9(2) of *The Code*, disability is a prohibited ground of discrimination. Mr. Webb's PTSD diagnosis is a physical disability within the meaning of "disability", and his reliance on a service animal is also protected by *The Code*:

> Applicable characteristics
> 9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are
> ...
> (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;
> ...

49. A service animal is defined as follows in the *Code*:

> "service animal" means an animal that has been trained to provide assistance to a person with a disability that relates to that person's disability;

50. The parties have also referred to *The Service Animals Protection Act*, C.C.S.M. c. S90, in which a "service animal" is defined as follows:

> (a) trained to be used by a person with a disability for reasons

relating to his or her disability;

(b) trained to be used by a peace officer in the execution of his or her duties; or

(c) trained to be used by a person who is authorized by a peace officer to assist peace officers in their duties.

51. The leading cases on the duty to accommodate in Canada are *Meiorin*, *supra*, and *Grismer*, *supra*. In these cases, the Supreme Court defined the duty to accommodate as having both procedural and substantive aspects.

52. The procedural aspect of the duty to accommodate involves making inquiries to determine the nature of a complainant's disability-related needs and to devise a solution to accommodate those needs. The substantive aspect of the duty requires a respondent to implement a solution if it is possible to do so without undue hardship. The obligations of the parties under both the procedural and substantive aspects of reasonable accommodation are mutual. The party seeking accommodation and the party with a duty to accommodate must work together cooperatively to arrive at a mutually acceptable solution.

53. The substantive aspect of the duty to accommodate is to provide reasonable accommodation. *The Code* does not require the person with a duty to accommodate to comply with the exact request of the person seeking accommodation. In *Morriseau* v. *Paisley Park* (2000), Manitoba Human Rights Commission Decisions, Adjudicator Suche stated:

> It must be remembered, of course, that accommodation does not have to be absolute or "perfect" accommodation. Rather, by definition, it must be reasonable. It may be that there is more than one alternative available, and in that instance, the employer or service provider, as the case may be, has the right to choose which accommodation it shall offer.

54. In *Council of Canadians with Disabilities* v. *VIA Rail Canada Inc.*, *supra*, at paragraphs 134 to 140, the Supreme Court of Canada outlined that undue hardship is a relative

concept. While the rights of persons with disabilities must not be undervalued, considerations of costs, safety and quality of service to the public must also be given due weight and "flexibility and common sense will not be disregarded."

55. In *Grismer, supra*, the Supreme Court of Canada considered whether the Superintendent of Motor Vehicles had met its duty to accommodate Mr. Grismer, who had a visual impairment. In finding that it did not, the Court said:

> "Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided... Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide an individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provided accommodation to the point of undue hardship. (at para. 22)

56. In concluding that Mr. Grismer was entitled to an individual assessment, the Court held that an individual assessment does not mean that the person will be entitled to the service at issue. However, the individual must be given the opportunity to demonstrate that his or her situation could be accommodated without sacrificing the legitimate goals of the organization and without incurring undue hardship. (*Grismer* at para. 44).

VI. ANALYSIS

57. As noted earlier in this decision, in light of the Carlsons' acknowledgement that Mr. Webb has established a *prima facie* case of discrimination, the sole issue for consideration is whether the Carlsons have demonstrated, on a balance of probabilities, that *bona fide* and reasonable cause exist for the discrimination.

58. In *Meiorin* and *Grismer*, *supra*, the Supreme Court of Canada outlined the following framework to determine whether there is a *bona fide* and reasonable justification for the Carlsons' Policy. The analysis requires me to consider if this Policy is:

(1) for a purpose or a goal that is rationally connected to the provision of the service;

(2) adopted in good faith, in the belief that it is necessary for the fulfillment of a legitimate service-related purpose or goal; and

(3) reasonably necessary to accomplish the legitimate service-related purposes.

59. In *Meiorin*, the Court confirmed that, once a complainant has established a *prima facie* case of discrimination, the burden of proof will then shift to the respondent to demonstrate that the rule or standard [here, the Policy] is a *bona fide* occupational requirement (BFOR). The Court set out the following three-step analysis for determining whether a respondent has justified the rule or standard:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that the respondent cannot accommodate the complainant and others adversely affected by the policy without incurring undue hardship? (at para. 54)

60. Although *Meiorin* was decided in the employment context, this reasoning and approach has been adopted to apply equally to other provisions of *The Code*, including section 13 relating to the provision of a service to the public. (See *Grismer*)

Issue 1: Did the Respondent adopt the Policy for a purpose rationally connected to the provision of the service?

61. The Carlsons advised that they implemented their Policy to serve three distinct goals or objectives: (a) to ensure that guests have full access to the property, including shared areas such as the courtyard, without having to be concerned with their safety, incidents or allergies; (b) to protect guest rooms and their property from damage and destruction; and (c) for economic reasons, as a room where a pet it housed would require thorough cleaning afterwards, which would be cost prohibitive. The Policy was an attempt by the Carlsons to balance their need to ensure the safety and enjoyment of its guests and control expenditures. In *Meiorin*, the Court asked what the impugned standard was generally designed to achieve and concluded that the employer must demonstrate a rational connection between the general purpose for the impugned standard and the objective requirements of the job. The focus of the test for validity was on the purpose of the standard.

62. In this case, the focus or purpose of the Policy is the need to ensure safety and the economic viability of the resort. I find that this purpose is rationally connected to the provision of the services offered by the Carlsons.

Issue 2: Did the Respondents adopt the Policy in an honest and good-faith belief that it was required in order to ensure safety and the economic viability of its operations?

63. There was no evidence to suggest that the Carlsons' decision to adopt the Policy was due to considerations other than legitimate ones. The Carlsons spent a significant amount of time in their evidence outlining the reasons for their Policy, and the costs associated with cleaning up after pets. They testified that their Policy was posted on their website and was readily available.

64. In this case, as noted above, the focus of the Policy is the economic viability of the resort. I have already determined that this purpose is rationally connected to the

provision of the service offered by the Carlsons. On the basis of the evidence presented, I conclude that its decision to adopt the Policy was honest and made in good faith, with no intention of discriminating against individuals with disability-related needs, such as Mr. Webb.

Issue 3: Is the Policy reasonably necessary to the accomplishment of the legitimate business purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the policy without incurring undue hardship?

65. At the third and final stage of the test, I must determine whether the impugned Policy is reasonably necessary for the respondents to accomplish its purpose. At this step, the respondents must establish that it cannot accommodate the complainant without experiencing undue hardship. If the respondent can accommodate individual differences without incurring hardship, the standard is not justified and it will be found to be discriminatory. Put another way, to successfully demonstrate that they have met this third prong of the test, the Carlsons must show that they could not have done anything further, to the point of undue hardship, to avoid the negative impact on Mr. Webb.

66. In *Meiorin*, the Court re-affirmed the following comments of Sopinka J. in *Central Okanagan School District No. 23* v. *Renaud* (1992), 16 C.H.R.R. D/425) to the effect that only accommodation to the point of undue hardship can be considered to be reasonable accommodation:

> …[m]ore than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the word “reasonable” and “short of undue hardship.” These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. (at D/434)

67. The duty to accommodate to the point of undue hardship rests with the respondent to a complaint, which is rebuttable if the respondent can demonstrate that they were unable to achieve a reasonable accommodation by the unreasonable action or inaction of the complainant. The respondent bears the duty to accommodate and to initiate the accommodation process, but the process of accommodation may require the complainant to take reasonable steps to move the process forward.

68. The search for accommodation is a multi-party search where both the complainant and the service provider play a role; and there is a duty on the complainant to assist in the search for appropriate accommodation. A complainant also has a duty to accept accommodation proposed by a service provider, if that accommodation is reasonable in the circumstances. (per *British Columbia (Public Service Employee Relations Commission, supra*, at para. 54)

69. In considering whether the Carlsons attempted to accommodate Mr. Webb to the point of undue hardship, I have considered the evidence of the Webbs, that the Carlsons did not provide any alternative to the requirements which they sought to impose in exchange for staying at the resort (ie. that the service animal neither be in the courtyard, nor enter the suite through the courtyard; that if the animal was disruptive, the Webbs would be asked to leave the hotel; and that the animal not be left unattended). I accept the evidence from Mr. Webb that these conditions were unreasonable and would have unduly denied them enjoyment of the shared amenities available at the resort.

70. I have considered the Carlsons' countervailing position that the Webbs did not request an accommodation in advance of attending the Resort, and I accept the Carlsons evidence that, had they known in advance, they could have anticipated and ensured that the Webbs would have been placed in more suitable accommodation. Further, I accept the Carlsons' evidence that the Webbs did not suggest alternatives to the

proposed conditions. Finally, I have considered that, once the accommodation was not accepted by Mr. Webb, the Carlsons attempted to find alternative accommodation for the Webbs.

71. In the circumstances of this case, the Carlsons contend that they discharged their duty to accommodate because Mr. Webb did not accept the accommodation it proposed. The Carlsons contend that they attempted to accommodate, but that these efforts were not reciprocated by Mr. Webb.

72. I disagree. I consider the Carlsons' reaction and their proposed accommodation to be reflexive, rather than considered. The Carlsons' own evidence was that they did not undertake a balancing assessment of considering that Spencer was a service animal, and not a "pet", which is a critical distinction. The Carlsons had an obligation to weigh their concerns with pets generally with Mr. Webb's specific disability-related needs and his request to be treated no better or worse than any other guest staying at the resort. The Carlsons also had an obligation to consider the impact of their Policy via-a-vis their obligation to ensure that services are accessible to individuals with protected characteristics under *The Code*.

73. Mr. Webb's evidence was that he urged the Carlsons to consult someone before insisting that they be accommodated on very strict conditions. They did not do so. Mr. Webb's evidence was also that the animal was clearly identifiable as a service animal: a fact that was not disputed by the Carlsons. If they were uninformed about service animals, as they intimated in their evidence, as a service provider, the Carlsons ought to have made further inquiries, specifically to address their concerns that it was not their responsibility to ensure the safety, care or supervision of the animal, and that any disturbances, incidents or disruptions could properly be addressed with the owner.

74. Accordingly, while I accept that the Carlsons raised legitimate issues with animals on the resort generally, they failed to undertake a balancing analysis to at least ascertain whether there were other options to the accommodation that they proposed to Mr. Webb, which I find would have unduly restricted him from fully enjoying the property as other guests of the resort. I do not believe that the Carlsons considered the Policy or proposed an accommodation that took into account their obligation, as service providers, to ensure that their resort was accessible to Mr. Webb, who was accompanied by a service animal as a result of his disability.

75. While the Carlsons candidly admitted that this process has enlightened them on the issues surrounding service animals, they stopped short of suggesting that they had done anything inappropriate in this case.

76. I have determined that, on the facts presented, the Carlsons proposed an alternative that did not factor in consideration of the issues raised by Mr. Webb, namely that the animal accompanying him was a service animal, highly trained to focus on Mr. Webb's particular needs, and to behave appropriately in public places. In the event that the animal was to misbehave, there are protocols to address these types of issues. The Carlsons had a responsibility to consider Mr. Webb's specific request, that they be accommodated in the suite that they had reserved, with unrestricted access to the facilities, and to generally be treated no better or worse than other guests staying at the Manigaming resort.

77. The proposed accommodation would have effectively denied Mr. Webb enjoyment of the resort's amenities and would have denied him the opportunity of spending time with his wife and family. On the facts of this case, I do not accept that the Carlsons' proposed accommodation was "reasonable in all the circumstances".

78. On the whole, I am not satisfied that the Carlsons have established the third component for establishing a *BFOR*. The Carlsons could have implemented an alternative approach that would have met their legitimate needs and would not have discriminated against Mr. Webb if they had made additional inquiries and satisfied themselves that the service animal was highly trained to focus on Mr. Webb's needs, and to behave appropriately in public places.

79. On the basis of the facts presented, I have concluded that the Carlsons did not attempt to accommodate Mr. Webb to the point of undue hardship.

VII. REMEDY

80. The authority to remedy discrimination is set out in Section 43(2)(c) of *The Code*, which authorizes an adjudicator to compensate a party adversely affected by a contravention of *The Code* damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect.

81. The Commission's counsel requests general damages for loss of dignity in the amount of $9,000.00. The Commission argues that this type of award is justified because the Complainant was devastated; his vacation ruined; and he suffered a significant setback in treatment as a result. Counsel submits other cases involving discrimination in the provision of services on the basis of disability, including reliance on a service animal, and noted that a range there emerges between $5,000 and $15,000. The Commission also points to the Manitoba decision in *Nachuk* v *City of Brandon*, 2014 CanLII 20644 (MB HRC), involving similar facts, where a settlement of $5,500 was not deemed to be reasonable by the adjudicator.

82. The Carlsons took exception to the amount requested by the Commission, noting that many of the decisions on which they relied were far greater and important breaches of *The Code*. It was also pointed out that *Nachuk* involved police officers, who were

employees of the City of Brandon. The Carlsons urged me to consider the decision in *Sprague* v. *RioCan Empress Walk Inc.*, 2015 HRTO 942, in which the Tribunal awarded $1,000.00 to the complainant, who had been denied service on the basis of disability, including reliance on a service animal.

83. In *Nachuk, supra*, Adjudicator Manning quoted from the decision of Adjudicator Peltz in *Budge* v. *Thorvaldson Care Homes Ltd*, dated March 2002 (found online at www.manitobahumanrights.ca/decisions.html):

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not be minimal, but ought to provide true compensation other than in exceptional circumstances for two reasons. First, it is necessary to do this to meet the objective or restitution . . . Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code. It is important that damage awards not trivialize or diminish respect for the public policy declared in the Code. *Cameron* v. *Nel-Gor Castle Nursing Home* (1984) 5 C.H.R.R. D/2170, approved in Miller, a 1995 decision cited earlier at para. 201,

84. The goal of a remedial order in a human right context is, to the extent possible, to make whole the victim of the discriminatory practice, having regard to the entire factual context provided. In this way, rather than being punitive, the remedy should seek to place the victim of the discrimination back in the position they would have been but for the discrimination.

85. In *Groupe Restaurants, supra*, the Board quoted from the decision in *Arunchalam* v. *Best Buy Canada*, 2010 HRTO 1880, which authority has been accepted in Manitoba. In *Arunchalam*, the Tribunal summarized some of the considerations relevant to an assessment of damages at paragraphs 52 to 54:

> The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin* v. *Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16.
>
> The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford* v. *Koop*, 2005 HRTO 53 at paras. 34-38.

86. The non-exhaustive list of relevant considerations discussed in *Sanford* v. *Koop* are: humiliation experienced by the complainant; hurt feelings; loss of self-respect, dignity, self-esteem, confidence; the experience of victimization and; the seriousness, frequency and duration of the offensive treatment.

87. I accept the evidence presented that Mr. Webb experienced significant mental and emotional distress and a setback in his treatment as a result of this experience. I am also satisfied on the evidence that in and around the time of the incident, Mr. Webb was dealing with complex mental health challenges, and that this incident alone cannot be attributed to Mr. Webb's decline. However, it is reasonable for me to conclude, on

the uncontested evidence presented, that the interaction and denial of service exacerbated his pre-existing medical condition.

88. The Carlsons pointed out that they are no longer the owners of the Manigaming Resort, and that there can be no further breaches as a result. I have already determined that Mr. Webb suffered harm as a result of this interaction. To accept the Carlsons suggestion that they should be less responsible as they are no longer proprietors would minimize the harm that was experienced by Mr. Webb, and his experience of discrimination.

89. Notwithstanding, I believe that it is worth noting that the Carlsons were genuine in their evidence that, with additional information, and knowing what they know today about service animals, they may have acted differently. They willingly accepted (albeit at the conclusion of the evidence) that Mr. Webb had met a *prima facie* case of discrimination on the facts presented. Although, it must also be added that the Carlsons mounted a defence predicated on defending their actions and denying that they did anything that would constitute a breach of *The Code*.

90. In arriving at a just award under section 43(2)(c) of *The Code*, I have considered the cases provided to me for consideration, and specifically those involving a denial of service. I agree with the submissions of the Carlsons that distinctions must be drawn between this case and *Nachuk*, which also involved the denial of service for an individual with a disability reliant on a service animal. *Nachuk* involved police officers of the City of Brandon who threatened an individual with incarceration if he did not leave the establishment. The complainant, who was out in public for the first time in two years, was accompanied by his service animal for similar reasons as in the present case, and suffered a significant relapse as a result. In determining that a settlement of $5,500.00 was insufficient, Adjudicator Manning considered that this matter involved police officers expected to uphold the *Code*, and that veiled threats of incarceration

further exacerbated the matter. Further, being escorted from the public premise was considered to be especially degrading for the complainant.

91. I do not find that the facts here rise to the same level of severity and demand the same remedy as discussed in *Nachuk*, involving police officers acting in execution of duty. The Commission relied in large part on *Nachuk* in support of their request for $9,000.00, noting that Adjudicator Manning had found a settlement amount of $5,500.00 to be insufficient.

92. I have reviewed the other decisions provided by Counsel for the Commission and the Carlsons. I have found the facts of those cases to be generally distinguishable from this case, but I have gleaned that the awards involving the denial of service to individuals reliant on service animals are generally related to the denial of service in restaurants or other establishments, and range from $500.00 to $15,000.00, depending on the number of denials of service in question and the severity of the encounter. In *Sprague* v. *RioCan Empress Walk Inc.*, 2015 HRTO 942, the Tribunal undertook a review of jurisprudence in awarding damages for injury to feelings, dignity and self-respect in cases that involve services animals or dogs, or guide dogs (see *Schussler* v. *1709043 Ontario*, 2009 HRTO 2194 ($500.00); *Smolak* v. *1636764 Ontario*, 2009 HRTO 1032 ($2,000.00); *Hill* v. *Bani-Ahmad*, 2014 HRTO 937 ($5,000.00); *Bourdeau* v. *Kingston Bazar*, 2012 HRTO 393 ($15,000.00); *Sweet* v. *1790907 Ontario Inc. o/a Kanda Sushi*, 2015 HRTO 433 ($2,500.00).

93. I have also considered other cases provided to me, including *Gauthier, supra*, in which the complainant was denied the opportunity to stay in a hotel because he was accompanied by a service animal. In that case, the complainant and his spouse had travelled eight hours and arrived in Toronto for the first time for the purpose of attending their niece's wedding. As a result of the denial of service, the complainant was required to find alternative accommodation in a city with which he was unfamiliar,

two and a half hours before the ceremony. The respondent did not file a response and did not participate in the process. The Tribunal concluded that the incident would have caused significant stress for the complainant and ordered the respondent to pay $5,000.00 as monetary compensation for injury to the complainant's dignity, feelings and self-respect.

94. While there are some similarities between *Gauthier* and this case, there are also clear distinctions. In *Gauthier*, there was a blanket denial of accommodation, without any discussion of possible accommodation; the respondent neither filed a response, nor corresponded with the Tribunal in setting out its position; and, while there was evidence of the significant stress and hardship imposed on the complainant as a result of the denial, there was limited evidence of degradation of the health of the complainant.

95. The adjudication panel has the ability to consider the actions of the complainant, and whether those actions have the effect of reducing the injury to dignity, feelings and self-respect. As noted above, as the dispute between Mr. Webb and the Carlsons progressed, Mr. Webb acknowledged that he was frustrated, and perhaps even angry. He acknowledged that he did not offer an alternative accommodation, as he was only looking for what he had already been promised – access to the suite previously reserved. When it became clear that it was not going to be available to Mr. Webb unless he accepted unreasonable conditions, he decided to cancel the reservation and determined that he would not conduct any business with the Manigaming. Mr. Webb testified that he is often queried about his reliance on a service animal, which he finds frustrating. This experience would have been no different for him, and it is understandable that he would have expressed some frustration. I do not believe that Mr. Webb's right to a reasonable accommodation was contingent on his being well-mannered.

96. Having considered all of the available evidence and the factors set out in *Arunachalam, supra,* along with other cases noted above, I find that a monetary compensation, for injury to dignity, feelings and self-respect, of $6,000.00 is appropriate in these circumstances. While it is less than the amount asked for by Mr. Webb, it is a significant sum that acknowledges the severity of the incident and its impact on Mr. Webb.

VIII. ORDER

97. For the above reasons, I order that the Respondents pay to the Complainant $6,000.00 as monetary compensation for the denial of service that led to injury to his dignity, feelings and self-respect.

DATED this 23rd day of November, 2020

Karine M. Pelletier
Adjudicator